Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF WATSEKA, COUNTY OF IROQUOIS AND STATE OF ILLINOIS, A HOME RULE MUNICIPALITY, AND ERNEST A. GROVE, MAYOR OF WATSEKA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Plaintiffs-Appellants,

v.

ILLINOIS PUBLIC ACTION COUNCIL AND AMERICAN CIVIL LIBERTIES UNION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
NO. 84-2605

RESPONSE TO MOTION TO AFFIRM

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QUESTION PRESENTED

The issues before the Court are adequately stated in Watseka's jurisdictional statement.

ARGUMENT

WATSEKA OBJECTS TO IPAC'S MOTION TO AFFIRM ON THE BASIS THAT THERE ARE MATERIAL MISINTERPRETATIONS OF THE FACTS AND LAW INVOLVED IN THIS APPEAL

Public places historically associated with free exercise of expressive activity, such as streets, sidewalks and parks, are considered, without more, to be public forums. In such places, the government's ability to permissibly restrict expressive conduct is very limited. The government may enforce reasonable time, place and manner regulations as long as the restrictions are context neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channel of communication. U. S. v. Grace, 461 U.S.171,177; 75 L.Ed.2d 736,743 (1983).

On the other hand, the homeowner has an absolute right to deny entry to would-be speakers. Thus, IPAC has no First Amendment right to enter private, residential property without consent of the home owner. IPAC has neither alleged nor shown any consent on the part of any homeowner of Watseka to solicit at the person's home. Without showing wherein it has a First Amendment right to solicit at a private residence, IPAC simply asserts that it has such right and seeks to apply to a private residence the restrictive rules applicable in a public forum. It is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. Clark v. Community for Creative Non-Violence, 468 U.S.288,293; 82 L.Ed.221,277 (1984).

On page 5 of its motion to affirm IPAC admits "there is no doubt that each Watseka resident may absolutely prohibit speech on his or her own property."

At page 5 of its motion, IPAC seems to recognize it has no basis to invoke the First Amendment, but only the reasonableness of the ordinance. It states the issue to be "whether Watseka can make the decision for IPAC and for everyone of Watseka's residents that no canvasser may call after 5 P.M." IPAC, in making such assertions, ignores Section 19-5 of Watseka's Code of Laws which states:

> "(Policy on Soliciting). It is hereby declared to be the policy of the City that the occupant or occupants of the residences of the City shall make the determination whether solicitors shall be or shall not be invited to their respective residences." (App. 26)

It further ignores the fact that the ordinance was passed at the request of Watseka's residents and that no resident of Watseka has objected to the ordinance.

All IPAC need do to solicit after 5 P.M. is to secure by telephone or by mail the invitation of the homeowner.

IPAC at page 6 of its motion relies upon Village of Schaumberg v. Citizens for a Better Environment, 444 U.S.620; 63 L.Ed.73 (1980), as authority for its Motion to Affirm, but Schaumburg does not support its position. No limitation on hours of solicitation was there in issue. Nor were there any limitations on hours of solicitation at issue in The Secretary of State v. Munson, 467 U.S.479 (1984); Hynes v. Oradell, 425 U.S.610 (1976); or Schneider v. City of Struthers, 319

U.S.141 (1943), all cited with the Schaumburg case. In Hynes v. Oradell, 425 U.S.610,619; 48 L.Ed.2d 243,252 (1976), this Court stated that "there is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on the door for any purpose, and the police powers permit reasonable regulation for public safety."

Martin v. City of Struthers, 319 U.S.141; 87 L.Ed.1313 (1943), also cited by IPAC with the Schaumburg case, was basically overruled by Breard v. Alexander, 341 U.S.622; 95 L.Ed.1233 (1950).

At page 6 of its motion, IPAC states: "The First Amendment right to disseminate ideas carries with it a corrolary right to receive information."

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S.620,632; 63 L.Ed.73 (1980), Martin v. City of Struthers, 319 U.S.141,143; 87 L.Ed. 1313 (1943). Accordingly, the rights of Watseka's citizens who would willingly receive IPAC's message are also abridged by the ordinance." IPAC has complete right 24 hours a day to present its views in all public streets, sidewalks and parks. All Watseka residents are available 48 hours a week to receive solicitors. Any resident may at any time invite in any solicitor he so desires.

IPAC attacks the position of Watseka that the greater incidence of crime after 5 P.M. is a justification for forbidding solicitation after 5 P.M. It does not refute or deny the validity of the statistics

presented by Watseka in support of its Motion for Summary Judgment.

IPAC only makes an issue of the fact that there were no specific crime statistics in Watseka to indicate there is greater incident of crime after 5 P.M. in Watseka.

Does Watseka have to wait until there is a beating, a home invasion or a rape in the evening hours before it can take steps to minimize the chance of such crimes? Can Watseka rely on recognized crime statistics to take preventive measures?

IPAC further claims, as some lower courts have erroneously concluded, that there are other means of preventing crime in the evening hours, such as prosecution for trespass, burglary or home invasions. IPAC ignores the fact that after 5 P.M., most offices are

closed and there is no way for a householder to check with the city as to the solicitor (IPAC does not dispute the requirement that all solicitors must register with the City).

Neither IPAC nor those courts explain the obvious impracticability of a homeowner sueing a solicitor for trespass or being a complaining witness in a criminal prosecution. This would involve identifying the solicitor, restraining him so he can be apprehended, and then taking the time at a later date to prosecute him. Similarly, it is small consolation to a homeowner, particularly a senior citizen, who has been beaten, robbed or raped that the State can prosecute the felon if the felon can be apprehended. It is suggested reasonable preventive measures are a more practical solution.

The request of Watseka residents to be undisturbed after 5 P.M. and the desire of the city to take steps to reduce the possibility of crime are certainly legitimate governmental interests.

IPAC argues that the homeowner can erect a sign forbidding solicitation and admits this is an acceptable restriction on the freedom of solicitation claimed by IPAC. IPAc does not explain how the sign is visible in the dark evening hours when IPAC wants to solicit. It is intolerable to expect the homeowner to illuminate the sign.

Is it unreasonable for homeowners in Watseka to exercise their right of privacy and freedom from intrusion by requesting the City Council to bar solicitation after 5 P.M. instead of placing an unsightly sign on their premises?

IPAC claims Watseka did not leave open ample alternative channels of communication. The error of this conclusion is clearly set forth in Cornelius v. NAACP Defense & Education Fund, 473 U.S. ; 87 L.Ed.2d 567,579 (1985).

As this Court indicated in Cornelius, IPAC has ample less intrusive means of contacting the residents of Watseka. IPAC can contact these persons by phone, newspaper, radio, television and mail. In addition, IPAC has from 9 A.M. to 5 P.M. six days a week to solicit the residents of Watseka on their private premises and unlimited time on the public streets, sidewalks and parks.

IPAC's contention throughout this litigation and in its Motion to AFfirm is that it is more desirable to confront persons face to face at their residences between 4 P.M. and 9 P.M.

Convenience of solicitation is Constitutionally immaterial. Kovac v. Cooper, 336 U.S.77,88; 93 L.Ed.513,523 (1948). The fact that IPAC may be able to collect more money in the evening hours is also Constitutionally immaterial. Breard v. Alexander, 341 U.S.622,640; 95 L.Ed.1233,1246 (1950).

CONCLUSION

The lengthy, carefully considered dissent to the decision in this cause in the Seventh Circuit Court of Appeals clearly establishes the great difference of opinion in the lower courts as to the rights of the homeowner to be free from disturbance in the evening versus the zeal of solicitors to present their cause or wares at an hour inconvenient to the householder.

This Court should, once and for all, make it clear that the rights granted by the First Amendment do not apply to persons such as IPAC who seek to present their views at private residences.

This appeal should be directed to the sole issue of whether Watseka, in the exercise of its police powers and

acting at the request of its citizens, acted reasonably in providing hours of solicitation from 9 A.M. to 5 P.M. six days a week.

The record will show voluminous uncontradicted evidence in support of Watseka's Motion for Summary Judgment, including crime statistics, the fear and concern of the residences of Watseka (many of whom are senior citizens) of home solicitation in the evening, and also their desire to be undisturbed in the evening hours.

IPAC's only response to this evidence was its conclusion, totally unsupported by any statistics or facts, that solicitation in the daytime was unprofitable and that it was more convenient to solicit at private homes in the evening.

Ordinances exercising police powers of the city are presumed to be Constitutional and the burden is upon its opponent to prove otherwise. As this Court indicated in Cornelius v. NAACP Defense & Education Fund, 473 U.S. 87 L.Ed.2d 567,579 (1985), Watseka's ordinances need not be the most reasonable choice to remedy a problem, only a reasonable choice.

It is urged that this Court, to settle these questions, deny IPAC's Motion to Affirm and accept the appeal. Watseka and IPAC will then have full opportunity to present their briefs to the Court as well as to submit the record to the Court for its review and consideration.

Respectfully submitted,

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